IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-581

WILLIAM CAHN,

Petitioner,

against

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of New York.

EDWARD NEWMAN and
NEIL R. CAHN
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(516) 741-5650
Counsel for Petitioner

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In the

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No. .

William Cahn,

Petitioner,

against

Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of New York.

Petitioner, William Cahn, prays that a writ of certiorari issue to review the order of the Court of Appeals of New York entered in the matter herein on July 11, 1978.

Orders and Opinions Below.

The *per curiam* opinion of the Supreme Court of the State of New York, Appellate Division, Second Department, dated October 24, 1977, granting respondent's motion for automatic disbarment of the petitioner, is reported at 59 A.D.2d 179. The order of the Court of Appeals of New York, entered March 28, 1978, denying petitioner leave to appeal to that Court, is reported at 44 N.Y.2d 641. No other orders or opinions have as yet been reported.

The order and memorandum opinion of the Supreme Court of New York, Appellate Division, Second Department, entered September 27, 1976, authorizing the disciplinary proceeding herein, are reproduced at page 1a of the Appendix. The order and memorandum opinion of the Supreme Court of New York, Appellate Division, Second Department, entered February 22, 1977, referring the matter for hearing, are reproduced at page 4a of the Appendix. The order of disbarment and *per curiam* opinion, of the Supreme Court of New York, Appellate Division, Second Department, entered October 24, 1977 and reported at 59 A.D.2d 179, are reproduced at page 7a of the Appendix. The order and memorandum opinion of the Supreme Court of New York, Appellate Division, Second Department, entered December 27, 1977, denying petitioner's motion for reargument and leave to appeal to the Court of Appeals of New York, are reproduced at page 12a of the Appendix. The order of the Court of Appeals of New York, denying petitioner leave to appeal to that Court, entered March 28, 1978, and reported at 44 N.Y.2d 641, is reproduced at page 15a of the Appendix. The order of the Court of Appeals of New York, entered July 11, 1978, dismissing petitioner's appeal, is reproduced at page 16a of the Appendix.

Jurisdiction.

The order of disbarment of the Supreme Court of New York, Appellate Division, Second Department, was entered on October 24, 1977. By order entered on December 27, 1977, petitioner's motion for reargument and leave to appeal to the Court of Appeals of New York was denied. The order of the Court of Appeals, denying petitioner leave to appeal, was entered on March 28, 1978. The order of the Court of Appeals dismissing petitioner's appeal was entered on July 11, 1978.

The jurisdiction of this Court is invoked under Title 28 of the United States Code, §1257(3). Each of the issues raised herein was expressly raised in the courts below.

Further, the petitioner was admitted as an attorney and counsellor of this Court on May 18, 1964. Rule 8 of this Court provides the petitioner with the opportunity to be heard why he should not be disbarred in light of these state proceedings. While no show cause order has as yet been received, petitioner would ask this Court to take cognizance of this matter so that he may be so heard.

Question Presented.

Does a revised judicial statutory interpretation, applied with limited retroactivity, which subjects an attorney to automatic and permanent disbarment and revokes his right to a hearing to offer mitigating evidence as a collateral result of a previous criminal conviction in a foreign forum, violate the Due Process, Equal Protection and Ex Post Facto clauses of the Constitution?

Constitutional Provisions and Statute Involved.

Constitution of the United States, Article I, Section 10:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Constitution of the United States, Amendment XIV, Section 1:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Judiciary Law of the State of New York, Section 90 (4):

> Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.
>
> Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court be struck from the roll of attorneys.

Statement of the Case.

On October 14, 1977, six days prior to the petitioner's scheduled disciplinary hearing, the respondent obtained an order requiring the petitioner to show cause why he should not be summarily disbarred. Despite the previous rulings in this matter that the petitioner was entitled to a hearing, the respondent's motion was granted and the name of the petitioner was stricken from the roll of attorneys.

This disciplinary proceeding was instituted as a direct result of the petitioner's federal criminal conviction. On

July 2, 1976, the petitioner was convicted in the United States District Court for the Eastern District of New York for violating the federal false statement and mail fraud provisions (18 U.S.C. §§ 1001, 1341). Underlying that conviction was the failure of the petitioner to provide certain private organizations with the opportunity to bargain with the petitioner's employer, the County of Nassau, New York, as to the payment of travel expenses.

These private organizations had invited the petitioner, then the District Attorney of Nassau County, to lecture or attend conferences at various places throughout the country. In each instance, the organizations agreed to pay all travel expenses. The petitioner, however, failed to disclose to these organizations that he could, and in fact did, arrange to have coincide additional business for the County at or near the location of each lecture or conference. Under these circumstances, it was held that these organizations were entitled to approach the County of Nassau to determine whether the County might have been willing to share those travel expenses.

As it was, the petitioner was entitled to obtain, and did obtain from the County, an advance for the expenses of each trip. Upon being reimbursed these expenses by the private organizations, the petitioner did repay the County for its advance. This was not accomplished, however, by a direct deposit to the County treasury. Rather, the monies received from the private organization were paid to a confidential informant of the petitioner. This was a legitimate obligation of the County. The County Comptroller recognized this repayment plan as an acceptable shortcut of traditional County bookkeeping procedures. In no way did the criminal charges indicate a fraud against or breach of duty to the County.

Rather, it was the private organizations which were not advised of a possible alternate source of payment of

travel expenses. They did not consent to the use of "their" monies as a fund for the informant. Indeed, these organizations had not been made aware of the existence of this informant. However, it was this plan for the payment of an informant which constituted the conduct underlying the conviction.

Under the law of the State of New York as it was on the date of the conviction, the petitioner was entitled to a hearing to offer evidence in mitigation of that conviction. An attorney could not use the disciplinary proceeding to collaterally attack his conviction. (Neither does the petitioner approach this Court to do so.) Rather, where the conduct underlying a conviction in a foreign forum was not cognizable as a felony under New York State laws, summary discipline could not be imposed. An attorney would be entitled to show, as here, that he neither intended nor received any personal benefit from his conduct, his record of service to the community and to the profession, and other indicia of his current fitness of character to continue his practice. Only after such a hearing would the Appellate Division of the State Supreme Court impose such discipline as it, in its discretion, deemed appropriate. Such had been the law of the State of New York since 1940.

Here, as the respondent conceded such below, it was determined that the conduct underlying the petitioner's conviction did not constitute a New York State felony. The Appellate Division first held that the petitioner was entitled to a hearing. Indeed, precedent was provided by the petitioner to show, under State law, both that his conduct was not criminal and that he could have judicially enforced the agreements of the private organizations to pay the entire expenses of the trips. The petitioner's hearing was scheduled for October 20, 1977.

On October 13, 1977, the New York State Court of Appeals, in *Matter of Chu*, 42 N.Y.2d 490, reinterpreted

§90(4) of the State's Judiciary Law, and held that an attorney convicted of any federal felony would be summarily disbarred for life. The conduct underlying the conviction would not be considered. No evidence could be offered in mitigation. No hearing would be held.

Moreover, the decision was to be given limited retroactive effect. In addition to its prospective application, only those attorneys previously convicted of federal felonies against whom disciplinary proceedings were then pending would be so disbarred. By judicial fiat, the Court of Appeals extended the collateral effects of a conviction in a foreign forum. Yet, that extension was neither applied solely prospectively to attorneys who would have notice of those effects, nor treated as an issue of status: that all attorneys previously convicted of federal felonies would now not be qualified to practice. This rule is unique to the legal profession; no other licensed field of employment is so treated.

On October 24, 1977, expressly upon the rationale of *Chu*, the Appellate Division, Second Judicial Department, of the New York State Supreme Court, vacated its own order authorizing the hearing, and ordered the petitioner disbarred.

Reasons for Granting the Writ.

1. A revised judicial statutory interpretation, applied with limited retroactivity, which subjects an attorney to summary disbarment and revokes his right to a hearing as a collateral result of his previous criminal conviction in a foreign forum, is contrary to the principles laid down by this Court that such violates the Due Process, Equal Protection and Ex Post Facto provisions of the Constitution.

The decision below challenges and focuses several of the principles established by this Court. Its impact af-

fects all discrete and insular minorities as well as that limited subclass of attorneys arbitrarily and conclusively disbarred for life by its immediate reach. It invites the judicial repeal of the Constitutional rights and requirements which this Court has protected from legislative encroachment.

The petitioner was summarily disbarred expressly as a result of the Court of Appeals decision in *Matter of Chu,* 42 N.Y.2d 490 (1977). Announced just six days prior to petitioner's scheduled disciplinary hearing, it mandated that the Appellate Division order his lifetime disbarment. That court vacated its own prior order which allowed for the examination of the conduct underlying petitioner's conviction and the consideration of mitigating evidence. It removed all discretion to impose appropriate discipline after a detailed and particularized consideration of the petitioner and the goals of such discipline.

A state cannot exclude a person from the practice of law in a manner which contravenes the Fourteenth Amendment. *Schware v. Board of Bar Examiners,* 353 U.S. 232, 238 (1957). Here, after 37 years, the Court of Appeals expanded its interpretation of Judicial Law §90 (4) to mandate the automatic disbarment of attorneys convicted of all federal felonies.

Previously, under *Matter of Donegan,* 282 N.Y. 285 (1940), a federal felony conviction would require summary disbarment only where the conduct underlying the conviction was cognizable under a state felony statute. Although the legislature has since amended this section eleven times, it did not choose to change the law in light of that case. (New York Session Laws 1941, c. 290, §43; L. 1943, c. 710, pt. 1, §1000; L. 945, c. 649, §44; L. 1946, c. 241, §2; L. 1949, c. 701, §1; L. 1948, c. 960, §24; L. 1961, c. 733; L. 1962, c. 310, §§ 205, 206; L. 1969, c. 743, §1; L. 1976, c. 325, §1.)

Despite this apparent legislative contentment, the Court of Appeals in *Chu* established a conclusive and permanent irrebutable presumption that an attorney convicted of a federal felony is, for his lifetime, unfit for the practice of law. The decision clearly challenges the Court's opinions that such presumptions are violative of the Fourteenth Amendment. *Cleveland Board of Education v. LeFleur,* 414 U.S. 632 (1974); *Vlandis v. Kline,* 412 U.S. 441, 446 (1973); *Stanley v. Illinois,* 405 U.S. 645 (1972).

Absent, here, is any comprehensive legislative investigation to justify the state action. *DeVeau v. Braisted,* 363 U.S. 144 (1960). To the contrary, here is judicial regression in the face of legislative satisfaction.

The conclusive presumption established by the Court of Appeals is rendered more suspect when recognizing there is an existing time-tested mechanism to make the focused inquiry into present fitness to practice. *Cf. Jiminez v. Weinberger,* 417 U.S. 628 (1974). The state's disciplinary procedures now exist to delicately balance the protection of the public with the interests of the attorney. The Appellate Divisions have been entrusted with the authority to impose the various measures of discipline as are warranted by each case. (Judiciary Law §90[2]).

It is not questioned that the legislature may require good character as a condition to the practice of a profession and reasonably determine what shall be evidence of such character. *Hawker v. New York,* 170 U.S. 189, 195 (1898). However, at issue is whether the courts may arbitrarily make such a determination in the face of legislative refusal.

In *Hawker*, this Court held that the New York State Legislature could require the absence of a New York State felony conviction as a condition to the practice of medicine. The local conviction was in effect an adjudication between the state and the physician establishing the commission of conduct which the legislature declared would render an individual morally unfit to practice medicine. The penal and licensing statutes were read *in pari materia.*

Here, however, the Court of Appeals has determined that despite the posture of New York, if another jurisdiction considers certain conduct felonious, a conviction in that jurisdiction will forever preclude the practice of law in New York. The respondent conceded that the petitioner's conduct was not felonious under local law; the petitioner provided precedent that his informant payment plan would be legally enforceable in that same court which disbarred him because of it. *Cf. Rubin v. Empire Mutual Insurance Company,* 25 N.Y.2d 426 (1969).

This very inequity was a basis for the earlier rule established by the Court of Appeals in *Matter of Donegan, supra.* Moreover, the writ should be granted in light of the questioned validity of *Hawker,* itself. *See Smith v. Fussenich,* 440 F.Supp. 1077 (D.Conn. 1977) (3 judge ct.)

Even in *Hawker,* the exclusion was treated as one of condition. There, all doctors previously convicted of felonies were barred from practice. Here, however, only those attorneys against whom disciplinary proceedings had not been concluded are summarily disbarred.

There can be no rational basis for distinguishing attorneys on the basis of the date of their disciplinary hearings if the rule is that all attorneys convicted of federal felonies are forever unfit to practice law. *Cf. Miller v. Carter,* 547 F.2d 1314 (7th Cir. 1977), *affirmed,* 434 U.S. 356 (1978). To conclusively deny one subclass of attorneys benefits available to another, denies equal protection. *See Jimenez v. Weinberger, supra,* 417 U.S. at 637.

By limiting the retroactive applicaton of the collateral effects of the conviction, the state courts have isolated a limited group of attorneys for special treatment. Exclusion from the practice of law can be regarded only as punishment. Were the legislature to add such a punishment, it would violate the Constitutional prohibitions against the passage of *ex post facto* laws. Constitution, Art. I §10; *Ex Parte Garland,* 71 U.S. 333, 377 (1866); *cf., United States v. Lovett,* 328 U.S. 303, 315 (1946). It must follow that the highest state court cannot apply a state statute to achieve precisely the same result. *Bouie v. City of Columbia,* 378 U.S. 347, 353 (1964).

Lastly, it should be noted that under New York law, it is only the attorney who suffers automatic deprivation of his professional license as a result of a felony conviction. Although they are required to possess good moral character, there are no explicit criminal record restrictions affecting the licenses of physicians (Education Law §6524), physiotherapists (Ed. Law §6534), dentists (Ed. Law §6604), nurses (Ed. Law §6904, 5), optometrists (Ed. Law §7104), engineers (Ed. Law §7206), psychologists (Ed. Law §7603), auctioneers (Agriculture & Markets Law §274), money lenders (Banking Law §343), etc. Further, an unconditional certificate of relief from disability issued pursuant to Article 23 of the Correction Law would seem to eliminate the criminal record restrictions on any type of license or employment except a license to practice law. *See Matter of Glucksman,* 57 A.D.2d 205 (1st Dept. 1977), *lv. to app. den.,* 42 N.Y.2d 804 (1977).

2. The decision below is in conflict with *Matter of Jones*, a decision of the Eighth Circuit, and the trend to scrutinize the collateral effects of a conviction on licensed employment.

In *Matter of Jones*, 506 F.2d 527 (8th Cir. 1974), the court held that due process required that an attorney in a federal district court disbarment proceeding be given the opportunity to present evidence in mitigation of his conviction. Such evidence is required to be considered so that appropriate discipline can be imposed.

The decision below is squarely in conflict with this decision. The courts below have revoked the right of the petitioner to present such evidence and to have such discipline imposed as is determined to be warranted in light of the conduct underlying his conviction and that mitigating evidence.

Further, the decision below runs afoul of the developing body of case law which has carefully scrutinized the collateral effects of a conviction, and particularly upon state-licensed fields of employment. *See e.g., Miller v. Carter*, 547 F.2d 1314 (7th Cir. 1977), *affirmed*, 434 U.S. 356 (1978); *Smith v. Fussenich*, 440 F.Supp. 1077 (D.Conn. 1977) (3 judge ct.); *Butts v. Nichols*, 381 F.Supp. 573 (S.D.Iowa 1974) (3 judge ct.).

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the order of the Court of Appeals of New York.

Respectfully submitted,

EDWARD NEWMAN and NEIL R. CAHN,
One Old Country Road,
Carle Place, N. Y. 11514
(516) 741-5650,
Counsel for Petitioner.

APPENDIX.

Order of the Supreme Court of the State of New York, Appellate Division, Second Department, Entered September 27, 1976, Authorizing Disciplinary Proceeding.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on September 27, 1976.

Hon. James D. Hopkins,
Acting Presiding Justice,
Hon. Henry J. Latham,
Hon. Charles Margett,
Hon. Vincent D. Damiani,
Hon. Samuel Rabin,
Associate Justices.

In the Matter

of

William Cahn, an attorney and counselor-at-law.

This court having received a certified copy of a judgment of the United States District Court for the Eastern District of New York, rendered July 2, 1976, which adjudged the above-named William Cahn, an attorney and counselor-at law (who was admitted to practice in this state by this court on June 17, 1949) guilty, upon a jury's verdict, of making false statements in application for reimbursement in travel expenses and accommodations in that he did not receive any reimbursement from any other source for said expenses and did induce another to make false statements

in an application for reimbursements in airfare expenses (U. S. Code, tit. 18, §§ 1001 and 1341) and sentenced him (1) to imprisonment for one year and one day on counts 1 through 44, (2) on count 45, sentence was suspended and he was placed on two years unsupervised probation and (3) to pay a fine of $2,500; now, pursuant to section 90 of the Judiciary Law and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts is hereby authorized to institute and prosecute a disciplinary proceeding in this court, as petitioner, against the said William Cahn, Esq., based on the acts which resulted in said conviction and on any acts of professional misconduct by him which may come to its attention, and it is further

ORDERED that Nicholas C. Cooper, Esq., of 16 Court Street, Brooklyn, New York, Chief Counsel to said Joint Bar Association Grievance Committee is hereby designated as counsel to prosecute the proceeding.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

Memorandum Opinion of the Appellate Division in Connection With Order Entered September 27, 1976.

In the Matter of William Cahn, an attorney and counselor-at-law. No. 257 Disc. Atty.

This court has received a certified copy of a judgment of the United States District Court for the Eastern District of New York, rendered July 2, 1976, which adjudged the above-name attorney (who was admitted to practice in this state by this court on June 17, 1949) guilty, upon a jury's verdict, of making false statements in applications for reimbursement in travel expenses and accommodations in that he did not receive any reimbursement from any other source for said expenses and did induce another to make false statement in application for reimbursement in airfare expenses (U. S. Code, tit. 18, §§ 1101 and 1341) and sentenced him (1) to imprisonment for one year and one day on counts 1 through 44, (2) on count 45, sentence was suspended and he was placed on two years' unsupervised probation and (3) to pay a fine of $2,500.

Accordingly, pursuant to section 90 of the Judiciary Law, the Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts is hereby authorized to institute and prosecute a disciplinary proceeding in this court, as petitioner, against said attorney, based upon the acts which resulted in said conviction and upon any other acts of professional misconduct by him which may come to its attention.

Nicholas C. Cooper, Esq., of 16 Court Street, Brooklyn, New York, Chief Counsel to said Joint Bar Association Grievance Committee is designated as counsel to prosecute the proceeding.

Hopkins, Acting P. J., Latham, Margett, Damiani and Rabin, JJ., concur.

September 27, 1976.

Order of the Appellate Division Entered February 22, 1977, Referring the Matter for Hearing.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on February 22, 1977.

Hon. James D. Hopkins,
Acting Presiding Justice,
Hon. M. Henry Martuscello,
Hon. Henry J. Latham,
Hon. Vincent D. Damiani,
Hon. Charles Margett,
Associate Justices.

In the Matter

of

William Cahn, an attorney and counselor-at-law.
The Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts,

Petitioner,

William Cahn,

Respondent.

A disciplinary proceeding having been instituted in this court upon the petition of the Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts, in respect to William Cahn, an attorney and counselor-at-law, admitted to practice by this court on June 17,

1949; the petition praying that the respondent be disciplined for professional misconduct upon the charges therein set forth; the proceeding having come on before this court by notice of petition, dated December 21, 1976; and the respondent having filed an answer to the petition;

Now, upon the petition verified December 21, 1976; the said answer verified January 17, 1977 and upon all the papers filed herein; and the proceeding having been submitted by John H. Schunke, Jr., Esq., of counsel for the petitioner and submitted by Neil R. Cahn, Esq., of counsel for the respondent, due deliberation having been had thereon; and upon the decision slip of the court herein, heretofore filed and made a part hereof, it is

Ordered that the issues raised by the petition and the answer are hereby referred to Hon. Frank J. Pino, a Justice of the Supreme Court, to hear and to report, with his findings upon each of the issues.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

Memorandum Opinion of the Appellate Division in Connection With Order Entered February 22, 1977.

No. 357 In the Matter of William Cahn, an attorney. The Joint Bar Association Grievance Committee for the 2nd and 11th Judicial Districts, petitioner; William Cahn, respondent.

In a proceeding to discipline respondent, an attorney, for professional misconduct, the issues raised by the petition and the answer are referred to Hon. Frank J. Pino, a Justice of the Supreme Court, to hear and to report, with his findings upon each of the issues.

Hopkins, Acting P. J., Martuscello, Latham, Damiani and Margett, JJ., concur.

February 22 1977

Order of the Appellate Division Entered October 24, 1977, Disbarring the Petitioner.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on October 24, 1977.

Hon James D. Hopkins,
Justice Presiding,
Hon. Henry J. Latham,
Hon. Charles Margett,
Hon. Vincent D. Damiani,
Hon. Samuel Rabin,
Associate Justices.

In the Matter

of

William Cahn, an attorney.

The Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts,

Petitioner,

William Cahn,

Respondent.

This court, by an order dated September 27, 1976, having directed the above named petitioner to institute and prosecute a disciplinary proceeding against the above named respondent William Cahn, an attorney and counselor-at-law, who was admitted to practice by this court on June 17, 1949, based on acts of professional misconduct in that on July 2, 1976 he was convicted, after trial in the United States

District Court for the Eastern District of New York, of 10 counts of violating section 1001 of title 18 of the United States Code and 35 counts of violating section 1341 of Title 18 of the United States Code; the said convictions having been upheld by the Court of Appeals for the Second Circuit; thereafter, the said proceeding having come on before this court by a notice of petition and petition, dated and verified December 21, 1976, and the said respondent having filed an answer thereto; thereafter by a further order of this court, dated February 22, 1977, the issues raised by the said petition and the answer were referred to Hon. Frank J. Pino, a Justice of the Supreme Court, to hear and report, with his findings upon each of the issues; the said hearing was thereafter postponed to October 20, 1977 due to the intervening incarceration of the respondent, thereafter, by an order to show cause dated October 14, 1977, the petitioner having moved to vacate this court's said order of February 22, 1977 and to strike the respondent's name from the roll of attorneys pursuant to subdivision 4 of section 90 of the Judiciary Law;

Now, upon reading and filing the said order to show cause and the affidavit of John H. Schunke, Jr., in support of the said motion and the affidavit of William Cahn and respondent's memorandum in opposition thereto; and John H. Schunke, Jr., Esq., having appeared of counsel for the petitioner and Neil R. Cahn, Esq., having appeared of counsel for the respondent, due deliberation having been had thereon and upon the *per curiam* opinion herein, heretofore filed and made a part hereof wherein this court has set forth its conclusion that the conviction of the said respondent William Cahn under the provisions of section 1001 of title 18 of the United States Code, a Federal felony, requires respondent's automatic disbarment under subdivision 4 of section 90 of the Judiciary Law (see *Matter of Chu,* N. Y. 2d [dec. Oct. 13, 1977]) and upon all the papers filed herein, it is

ORDERED that the petitioner's motion is hereby granted, and this court's order dated February 22, 1977 is hereby vacated, and it is further

ORDERED that, on this court's own motion, this court's order dated September 27, 1976 is hereby vacated, and it is further

ORDERED that, effective October 24, 1977, the name of William Cahn is hereby directed to be struck from the Roll of Attorneys and Counselors-at-Law entitled to practice law, and it is further

ORDERED that, pursuant to said Statute (Judiciary Law, §90), the said William Cahn is hereby commanded to desist and refrain: (1) from the practice of the law in any form, either as principle, or as agent, clerk or employee of another; (2) from appearing as an attorney or counselor-at-law before any judge, justice, board, commission or other public authority; (3) from giving another an opinion as to the law or its application or any advice in relation thereto; and (4) from holding himself out in any way as an attorney and counselor-at-law, and it is further

ORDERED and DIRECTED that the said William Cahn shall comply with this court's rules governing the conduct of disbarred, suspended or resigned attorneys—a copy of such rules being annexed hereto and made a part hereof.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

Per Curiam Opinion of the Appellate Division in Connection With Order Entered October 24, 1977 (Reported at 59 A. D. 2d 179).

October 24, 1977

SUPREME COURT,

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT.

HOPKINS, J. P., LATHAM, MARGETT, DAMIANI and RABIN, JJ.

IN THE MATTER

of

WILLIAM CAHN, an attorney.

THE JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Petitioner;

WILLIAM CAHN,

Respondent.

No. 5420

Disciplinary proceeding instituted by the Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts. By order of this court, dated February 22, 1977, the issues were referred to Hon. Frank J. Pino, a Justice of the Supreme Court, to hear and report.

Nicholas C. Cooper, Brooklyn, N. Y. (John H. Schunke, Jr. of counsel), for petitioner.

Neil R. Cahn, Carle Place, N. Y. for respondent.

Per Curiam Respondent was admitted to practice by this court on June 17, 1949. On July 2, 1976 he was convicted, after trial in the United States District Court for the Eastern District of New York, of 10 counts of violating section 1001 of title 18 of the United States Code and 35 counts of violating section 1341 of title 18 of the United States Code. Those convictions have been upheld by the Court of Appeals for the Second Circuit.

By an unpublished order dated September 27, 1976, this court directed petitioner to institute and prosecute a disciplinary proceeding against respondent based upon acts of professional misconduct. By a second unpublished order dated February 22, 1977, we directed that the issues raised by the petition and answer in that disciplinary proceeding be referred to Hon. Frank J. Pino, a Justice of the Supreme Court, to hear and report, with his findings upon each of the issues. That hearing was thereafter postponed to October 20, 1977 due to the intervening incarceration of respondent. By order to show cause granted on October 14, 1977, petitioner has moved to vacate our order of February 22, 1977 and to strike respondent's name from the roll of attorneys pursuant to subdivision 4 of section 90 of the Judiciary Law.

We conclude that the conviction of the respondent under the provisions of section 1001 of title 18 of the United States Code, a Federal felony, requires his automatic disbarment under subdivision 4 of section 90 of the Judiciary Law (see *Matter of Chu,* NY2d [dec. Oct. 13, 1977]). We therefore grant petitioner's motion and vacate our order of February 22, 1977 and, on this court's own motion, the order of September 27, 1976 is vacated. Respondent is therefore disbarred from the further practice of law and his name is removed from the roll of attorneys and counselors-at-law, effective forthwith.

Hopkins, J.P., Latham, Margett, Damiani and Rabin, JJ., concur.

Order of the Appellate Division Entered December 27, 1977, Denying Reargument and Leave to Appeal.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 27, 1977.

Hon. James D. Hopkins,
Justice Presiding,
Hon. Henry J. Latham,
Hon. Charles Margett,
Hon. Vincent D. Damiani,
Hon. Samuel Rabin,
Associate Justices.

In the Matter

of

William Cahn, an attorney.

The Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts,

Petitioner;

William Cahn,

Respondent.

In the above disciplinary proceeding, this court, by an order dated October 24, 1977, having struck the above named respondent's name from the Roll of Attorneys and Counselors-at-Law, effective October 24, 1977; and the respondent having moved, by a notice of motion, dated October 27, 1977, (1) for reargument of the determination

of this court in this proceeding, which resulted in the said order dated October 24, 1977, or (2) in the alternative, for leave to appeal to the Court of Appeals from the said order;

Now, on reading and filing the said notice of motion, the affirmation of Neil R. Cahn and the respondent's memorandum in support of the said motion, the affirmation of John H. Schunke, Jr. and the petitioner's memorandum in opposition thereto and the reply affirmation of Neil R. Cahn; and upon all the papers filed herein; and Neil R. Cahn, Esq., having appeared of counsel for the respondent and John H. Schunke, Jr., Esq., having appeared of counsel for the petitioner, due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

Ordered that the said motion is hereby denied in all respects.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division.

Memorandum Opinion of the Appellate Division in Connection With Order Entered December 27, 1977.

No. 6236 ms

In the Matter

of

William Cahn, an attorney.

The Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts,

Petitioner;

William Cahn,

Respondent.

Motion by respondent (1) for reargument of the determination of this court in the proceeding, which resulted in the order dated October 24, 1977, or (2) in the alternative, for leave to appeal to the Court of Appeals from said order dated October 24, 1977.

Motion denied in all respects.

Hopkins, J.P., Latham, Margett, Damiani and Rabin, JJ., concur.

Order of the Court of Appeals Entered March 28, 1978, Denying Leave to Appeal (Reported at 44 N. Y. 2d 641).

COURT OF APPEALS,

State of New York.

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-eighth day of March A. D. 1978.

Present,

Hon. Charles D. Breitel, Chief Judge, presiding.

2 Mo. No. 195

In the Matter

of

William Cahn, an Attorney and Counselor-at-Law.

The Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts,

Respondent,

William Cahn,

Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is denied. Wachtler, J., taking no part.

JOSEPH W. BELLACOSA
Clerk of the Court

Order of the Court of Appeals Entered July 11, 1978, Dismissing Appeal.

COURT OF APPEALS,

STATE OF NEW YORK.

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eleventh day of July A. D. 1978.

Present,

Hon. Charles D. Breitel, Chief Judge, presiding.

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2 Mo. No. 613

IN THE MATTER

of

WILLIAM CAHN, an Attorney.

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent,

vs.

WILLIAM CAHN,

Appellant.

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involed. Wachtler, J., taking no part.

JOSEPH W. BELLACOSA
Clerk of the Court

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-581

WILLIAM CAHN,

Petitioner,

against

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. _____

WILLIAM CAHN,

Petitioner,

v.

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

PRELIMINARY STATEMENT

Respondent's brief is submitted in opposition to the petition for a Writ of Certiorari to review an order of the Court of Appeals of the State of New York, entered on July 11, 1978, which dismissed petitioner's appeal to that court upon the ground that no substantial constitutional question was directly involved.

Previously, applications for leave to appeal to the Court of Appeals of New York from an order of the Appellate Division, Second Judicial Department, entered on October 24, 1977, which had struck petitioner's name from the roll of attorneys of the State of New York, had been denied by the Appellate Division on December 27, 1977 (A.12a) and the Court of Appeals on March 28, 1978 (A.15a).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28 U.S.C. 1257(3).

STATEMENT OF THE CASE

Petitioner was admitted to the practice of law in New York State on June 17, 1949 by the Appellate Division, Second Judicial Department. On July 2, 1976, after

a jury trial held in the United States District Court for the Eastern District of New York, respondent was adjudged guilty of forty-five (45) counts of an indictment which had charged him with ten (10) counts of making false statements (Title 18 U.S.C. 1001) and thirty-five (35) counts of mail fraud (Title 18 U.S.C. 1341), and sentenced as follows:

> "1 year and 1 day to run concurrent on counts 1 through 44. On count 45, imposition of sentence is suspended and the defendant is placed on 2 years unsupervised probation. The defendant is fined $2,500 to run concurrent on all counts."

On November 8, 1976, respondent's judgment of conviction was affirmed by the United States Court of Appeals for the Second Circuit, and on March 21, 1977, the United States Supreme Court denied petitioner's petition for a writ of certiorari on direct appeal from the judgment of conviction.

Based upon his conviction of federal felony crimes, petitioner's name was struck from the roll of attorneys and counsellors-at-law of the State of New York, by order of the Appellate Division, Second Judicial Department on October 24, 1977, pursuant to New York Judiciary Law Section 90, subdivision 4, which provides:

> "4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.
>
> Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys."

POINT ONE

PETITIONER'S NEW YORK DISBARMENT BASED UPON CONVICTION OF FEDERAL FELONY CRIMES DOES NOT VIOLATE DUE PROCESS, EQUAL PROTECTION AND EX POST FACTO PROVISIONS OF THE CONSTITUTION

Prior to March 5, 1940, an attorney was deemed disbarred and his name was stricken from the roll of attorneys upon conviction of any crime statutorily defined as a felony under the laws of New York, a sister State or of the United States pursuant to the then Judiciary Law, Section 88, subdivision 3 (renumbered Judiciary Law, Section 90, subdivision 4 [1945]).

On March 5, 1940, the New York Court of Appeals in *Matter of Donegan* (282 N.Y. 285) qualified the automatic disbarment statute to the following extent:

"Strict construction of section 88, subdivision 3 and section 477 of the Judiciary Law requires that the term 'felony' include only those Federal felonies which are also felonies under the laws of this State, and exclude such Federal felonies as are 'cognizable by our laws as a misdemeanor or not at all'" (supra at 292).

On October 13, 1977, in *Matter of Chu*, 42 N.Y.2d 490, a case involving automatic disbarment of an attorney convicted of violating Title 18 U.S.C. 1001, one of the federal statutes of which petitioner herein was similarly convicted, the New York Court of Appeals modified the *Donegan* case ruling and held:

"We conclude that conviction of an attorney for criminal conduct judged by the Congress to be of such seriousness and so offensive to the community as to merit punishment as a felony is sufficient ground to invoke automatic disbarment. Whatever may have been the proper evaluation of a felony conviction in courts other than those of our own State in 1940 when *Donegan*

was decided, we now perceive little or no reason for distinguishing between conviction of a Federal felony and conviction of a New York State felony as a predicate for professional discipline. Certainly is this so when, as here, there is a New York State felony of substantially the same elements. When it is the underlying conduct of the attorney which calls for disciplinary response, it makes little sense to say that although that conduct has been defined as felonious throughout the nation under Federal law, the attorney is not to be automatically disbarred unless our State Legislature has enacted a precisely matching felony statute. To accord determinative significance to such statutory discrepancy would be to elevate insignificance."

The Court of Appeals in the *Chu* decision noted the similarity of the federal and state statutes proscribing the filing of false statements stating:

"Additionally in the present instance there is a very close, if not a precise, parallelism between the conduct proscribed by § 1001 and that proscribed by § 175.35. It does not strike us as significant for present purposes that under one statute the filing of the false

> statement must be with a department or agency of the United States while under the other filing must be in an office of the State or a political subdivision thereof.
>
> * * *
>
> The core of the offense under both statutes is the willful filing in a governmental office of a false statement knowing it to be false. In the present case we hold that such matching suffices."

The New York Court of Appeals on October 19, 1978, in *Matter of Thies,* ____ N.Y.2d ____, declined to reconsider its earlier *Chu* decision that conviction of a federal felony works an automatic disbarment, reiterating that it was "immaterial that there is no felony analogue under our State statutes matching the federal felony" and pointed out that "the validity of the concept of automatic disbarment as applied to New York felonies has long been upheld."

Petitioner's automatic disbarment is not violative of his constitutional guarantee of due process since that right was safeguarded throughout his jury trial in the federal court and upon the review of his conviction by the Circuit Court of Appeals for the Second Circuit. Petitioner seeks to review, in a civil disciplinary hearing, his conviction of federal felony crimes which has already been affirmed after appellate review and which the United States Supreme Court itself declined to consider upon his previous Petition for Certiorari.

Respondent recognizes that a state cannot exclude a person from the practice of law in a manner which contravenes the Fourteenth Amendment (*Schware v. Board of Bar Examiners,* 353 U.S. 232, 238) and that the power of a state to

regulate the practice of law may not be exercised in an arbitrary or discriminatory manner (*Koenigsberg v. Board of Examiners*, 353 U.S. 252, 273). The United States Supreme Court has defined specific Fourteenth Amendment guidelines, as follows:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 425-426; (see also: *Rankin v. Shankar*, 23 N.Y.2d 111, 119).

The legislature of New York has determined, in enacting Judiciary Law, Section 88, subdivision 3 (renumbered Judiciary Law, Section 90, subdivision 4 [1945]) that an attorney convicted of a felony crime is conclusively unfit to practice law and is automatically disbarred (*Matter of Keogh*, 25 A.D.2d 499, 500, mod on other grounds, 17 N.Y.2d 479). The purpose of the statute is clear, namely, to maintain high professional standards for members of the bar and to protect the public. The elimination from the bar of attorneys who have been found guilty of felonious conduct is reasonably related to that goal. As the New York Court of Appeals stated in *Matter of Mitchell*, 40 N.Y.2d 153, 156:

"In our view, this concern for the protection of the public interest far outweighs any interest the convicted attorney has in continuing to earn a livelihood in his chosen profession. Appellant, upon admission to the Bar, became an officer of the court, and, 'like the court itself, an instrument or agency to advance the ends of justice." *(People ex rel. Karlin v. Culkin,* 248 N.Y. 465, 471 [CARDOZO, J.].) To permit a convicted felon to continue to appear in our courts and to continue to give advice and counsel would not 'advance the ends of justice', but instead would invite scorn and disrespect for our rule of law. Justice BRADLEY, writing nearly one hundred years ago, expressed this same fear in language equally applicable to this case and particularly to this attorney: 'Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, to trample them under foot, and to ignore the very bands of society, argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve.' (*Matter of Wall,* 107 U.S. 265, 274.)"

Petitioner contends that the automatic disbarment of attorneys convicted of a federal felony, due to the New York Court of Appeals ruling in *Matter of Chu,* 42 N.Y.2d 490, violates ex post facto provisions of the United States Constitution. An ex post facto law has been defined as one:

> "which imposes a punishment for an act which was not punishable when it was committed, or imposes additional punishment, or changes the rules of evidence, by which less or different testimony is sufficient to convict." (C.J.S. Constitutional Law Section 435 et seq.)

The constitutional limitation as regards ex post facto laws has long been held to apply solely to criminal statutes (*Baltimore & S.R. Co. v. Nesbit,* 51 U.S. 395; see also, *Mahler v. Eby,* 264 U.S. 32). Disciplinary proceedings have consistently been held to be civil in nature

(*Matter of Zuckerman*, 20 N.Y.2d 430, 438 [1967], cert. den. 390 U.S. 925 [1968], see also *Matter of Ungar*, 27 A.D.2d 925 [1st Dept. mem. 1967], cert. den. 389 U.S. 1007 [1967]).

Petitions for Writs of Certiorari have recently been sought by disbarred attorneys, based upon the same claims of constitutional infirmities of the New York Judiciary Law, Section 90, subdivision 4, and in each case the Supreme Court had denied the applications (*Peltz v. Joint Bar Association Grievance Committee*, 43 N.Y.2d 646, cert. den. May 3, 1978, ____ U.S. ____; *Davis v. Joint Bar Association Grievance Committee*, 44 N.Y.2d 641; cert. den. October 2, 1978 and *Rosenberg v. Joint Bar Association Grievance Committee*, 62 A.D.2d 1065, mot lv. to app. den. 44 N.Y.2d 648, cert. den. October 30, 1978, ____ U.S. ____).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: Brooklyn, New York
November 30, 1978

Respectfully submitted,

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78-581

IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-851

WILLIAM CAHN,

Petitioner,

against

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

Petitioner's Reply Brief in Support of Petition for a Writ of Certiorari to the Court of Appeals of New York

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In The

Supreme Court of the United States

October Term, 1978.

No. 78-851

WILLIAM CAHN,

Petitioner,

against

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

Petitioner's Reply Brief in Support of Petition for a Writ of Certiorari to the Court of Appeals of New York

Preliminary Statement

Petitioner's brief is submitted in reply to the respondent's brief in opposition to the petition for a writ of certiorari to review an order of the Court of Appeals of New York.

REASONS FOR GRANTING THE WRIT

1. Petitioner's disbarment violated the Due Process, Equal Protection, and Ex Post Facto provisions of the Constitution.

The respondent has not chosen to use its brief to discuss the issues raised by the petitioner. No attempt is made to justify the revised judicial statutory interpretation of the New York State Court of Appeals in the face of 38 years of legislative inaction. No attempt is made to show any comprehensive investigation to warrant a change in disbarment procedures. No attempt is made to justify the elimination of the existing time-tested mechanism to make the focused inquiry into present fitness to practice law. No attempt is made to justify the limited retroactive application of that judicial interpretation. No discussion whatsoever is addressed to that trend of decisions in other jurisdictions scrutinizing and setting aside the collateral effects of a conviction on licensed employment.

Rather, respondent takes this opportunity to retreat from the position which respondent has maintained throughout the two year history of this disciplinary proceeding.

First, the respondent now indicates that the conduct underlying the petitioner's federal conviction would warrant a New York State felony conviction. Throughout this proceeding, the respondent had conceded that such was not the case. Indeed, implicit in the unappealed Order of Reference (Appendix at 4a), was the recognition that the conduct herein did not fall within the purview of a New York State felony statute. Further, respondent's position did not change subsequent to the Court of Appeals decision in *Matter of Chu,* 42 N.Y.2d 490 (1977).

In *Chu,* the attorney had, as here, been convicted of violating 18 U.S.C. §1001. However, there, the conduct underlying that conviction included the procurement, through mercenary marriages, of permanent residence status for aliens. In connection therewith, Mr. Chu made and suborned the making of false and fraudulent documents which were submitted to the Immigration and Naturalization Service and, in addition, suborned perjurious testimony of witnesses. The Bar Association appealed the Order of Reference made therein to the Court of Appeals, claiming that Mr. Chu's conduct did fall within the proscriptions of New York State Penal Law §175.35, a felony, thus requiring his automatic disbarment. The Court of Appeals apparently agreed. However, it is submitted that there can be no automatic equation of 18 U.S.C. §1001 and Penal Law §175.35.

Because of the interpretations of federal felony statutes by district courts, a great variety of conduct, of markedly different magnitudes, can constitute a violation of 18 U.S.C. §1001. However, Penal Law §175.35 provides:

> "A person is guilty of offering a false instrument for filing in the first degree when, knowing that a written instrument contains a false statement or false information, and with intent to defraud the state or any political subdivision thereof, he offers or presents it to a public office or public servant with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office or public servant."

Here, ten claim forms submitted to private organizations from which petitioner sought expense reimburse-

ment were the basis for the ten counts under §1001. However, in not one instance was the claim form submitted to any public office or servant. The claims were not to become, in any way, a part of the records of any public office or public servant. In seven of the ten counts, no false statement was made. Rather, the petitioner was convicted for failing to disclose to the private organizations his payment plan for his confidential informant. In those three counts where a false statement was attributed to the petitioner, unlike New York law (*People* v. *Altman*, 88 Misc. 2d 771 [Sup.Ct. Nass.Co. 1975]), it was not necessary that those statements be proven material. *See United States* v. *Aadal*, 368 F.2d 962 (2d Cir. 1966), *cert. denied*, 385 U.S. 882, 386 U.S. 970.

Further, while the Court of Appeals in *Chu* noted that §1001 does not require a specific intent to defraud, it nevertheless analogized that section to Penal Law §175.35. The Court of Appeals did not comment on the existence of Penal Law §175.30, a misdemeanor statute in all respects identical to §175.35, but, like the federal statute, eliminating the element of the intent to defraud.

The conduct underlying the petitioner's conviction will not support a New York State felony conviction. The respondent has conceded this issue. The Appellate Division, in its Order of Reference, recognized this conclusion.

Further, the fact that such dramatically different conduct as is presented here and as was presented in *Chu* can both support a federal conviction under the same felony statute should require a case by case inquiry before lifetime disbarment is imposed by a foreign forum. Such, it is submitted is required by the interests of justice and fundamental fairness. It is required under the due process provision of the Constitution.

Second, respondent now, for the first time, argues that the petitioner is attempting to use this disciplinary proceeding to collaterally attack his conviction. The respondent was privy to numerous telephone conversations, as well as conferences before the Referee, which carefully established the ground rules for petitioner's scheduled hearing. Both parties, and the Referee, recognized that the hearing could not and was not going to be used to review or attack petitioner's conviction. *See Matter of Levy*, 37 N.Y.2d 279, (1975).

In that regard, after careful review of the Judge's charge in the criminal case, it was recognized that the petitioner was convicted for submitting his claims for reimbursement to private organizations, "believing" that had he disclosed his confidential informant payment plan to the private organizations, they "might" not have reimbursed petitioner. The payments to the informant were an affirmative defense to be established by the petitioner by a showing that the private organizations "consented" to the use of their monies for this purpose. As the private organizations were not made aware of the informant for traditional security and investigatory reasons, this defense could not be established. Therefore, the respondent agreed that the petitioner, at his hearing could testify that he did not intend nor receive any personal benefit as a result of his conduct; that such conduct was simply what he believed to be a good faith attempt to maximize the confidentiality of his informant. The federal criminal court trial judge charged the jury that the petitioner's payment plan could nevertheless, in and of itself, be fraudulent; that no explicit guideline, by-law, regulation, statute, or policy formulation was required to make it so. The criminal court charged that it was more to the point to say that no such gudeline, by-law, etc., explicitly authorized the petitioner's payment plan. Thus, petitioner

could testify at his disciplinary hearing to his motivation and demonstrate the existence of precedent that the presentation of duplicate claims was legal, even where personal benefit was intended. *Cf. Rubin* v. *Empire Mutual Insurance Company,* 25 N.Y.2d 426 (1969).

The respondent concludes by stating that whatever due process protection the petitioner is afforded under the Constitution was satisfied at his criminal trial. Thus respondent argues the *Legislature* of the State of New York can and has determined to subject the petitioner to automatic lifetime disbarment as a result of that criminal conviction without offending the petitioner's guarantees under the Constitution.

Surely, even a state legislature does not have uncontrolled discretion is this area. However, here it is not the legislature which made the determination resulting in the petitioner's disbarment. Rather, such was the determination of the Court of Appeals in the face of a 38 year legislative history which declined to amend Judiciary Law §90(4) in light of the existing statutory interpretation requiring that petitioner be granted a hearing.

The respondent's sole argument addressed to the limited retroactive application of the *Chu* decision is that as a disciplinary hearing is not criminal (although it has been recognized as quasi-criminal), no argument concerning retroactivity can have any merit. For the reasons set forth at pages 10 and 11 of the petition herein, it is again submitted that the limited retroactive application in issue has violated the petitioner's rights under due process, equal protection and *ex post facto* provisions of the Constitution.

Lastly, the respondent notes that this Court has recently denied certiorari in three New York State disbarment proceedings. First, it is submitted that the fact pattern presented herein clearly and uniquely focuses the constitutional issues for the consideration of this Court. Second, the denial of certiorari should not be used as precedent to indicate the lack of meritorious and substantial constitutional questions. Finally, the previous petitions demonstrate that petitioner is not the sole victim of summary disbarment, and thus the issues presented herein are of general importance and should in the interests of justice be considered by this Court.

CONCLUSION

For the foregoing reasons and those contained in the petition, a writ of certiorari should issue to review the order of the Court of Appeals of New York.

Respectfully submitted,

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